88-71

In The
Supreme Court of the United States

October Term, 1987

In the Matter of the Application of
ROBERT H. and BEATRICE A. WEDINGER,
Petitioners-Appellants,

For a Judgment under Article 78 of the Civil Practice Law and Rules

-against-

HELENE G. GOLDBERGER, ASSISTANT REGIONAL ATTORNEY, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; WAYNE RICHTER, BIOLOGIST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOSEPH J. PAYNE, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JEFF RABKIN, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and the DEPARTMENT OF ENVIRONMENTAL CONSERVATION, HENRY G. WILLIAMS, COMMISSIONER,
Respondents-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

I. Did the Court of Appeals for the State of New York interpret the Environmental Conservation laws dealing with the mapping of freshwater wetlands in Richmond County in a manner which contravenes Supreme Court precedent as well as the Due Process Clause of the United States Constitution?

II. Did the Court of Appeals for the State of New York decide the taking issue raised in the case of *Wedinger v. Goldberger,* contrary to federal law?

THE PARTIES

The full names of the original parties are as shown in the above caption. There have been no changes in the parties.

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OPINIONS BELOW

A. *In the Matter of Wedinger v. Goldberger,* 499 NYS 2d 600 (Sup. Ct., Richmond County, 1986) (full opinion is located in the Appendix at pages 4a-16a).

B. *In the Matter of Wedinger v. Goldberger*, 129 AD2d 712, 514 NYS2d 474 (2nd Dept. 1987) (full opinion is located in the Appendix at pages 19a-27a).

C. *Wedinger v. Goldberger*, __ NY2d __ (decided on March 22, 1988) (full opinion is located in the Appendix at pages 30a-40a).

JURISDICTION STATEMENT

It is respectfully submitted that the Supreme Court of the United States has jurisdiction to hear this case pursuant to Sup. Ct. Rule 17(1)(c) in that the Court of Appeals for the State of New York has decided important questions of law in a manner that is in conflict with applicable decisions of this Court. The decision sought to be reviewed was decided and entered on March 22, 1988.

Supreme Court review is sought based on 28 U.S.C.A. §1257(3), by writ of certiorari due to the fact that the validity of a State Statute is challenged on the grounds that it is repugnant to the United States Constitution.

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment at a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time at war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

17½ McKinney's New York Environmental Conservation Laws §24-0301:

§24-0301. Commissioner's study

"1. The commissioner shall, as soon as practicable, conduct a study to identify and map those individual freshwater wetlands in the state of New York which shall have an area of at least twelve and four-tenths acres or more, or if less than twelve and four-tenths acres, (a) have, in the discretion of the commissioner, and subject to review of his action by the board created pursuant to title eleven of this article, unusual local importance for one or more of the specific benefits set forth in subdivision seven of section 24-0105 or (b) are located within the Adirondack park and meet the definition of wetlands contained in subdivision sixty-eight of section eight hundred two of article twenty-seven of the executive law, and shall determine their characteristics. This study shall, in addition to such other data as the commissioner may determine to be included, consist of the freshwater wetlands inventory of the department of environmental conservation, currently being made, together with other available data on freshwater wetlands, whether assisted by the state of New York under the tidal wetlands act or otherwise, or assembled by federal or local governmental or private agencies, all of which information shall be assembled and integrated, as applicable, into a map of freshwater wetlands of the state of New York. Such study may, in the discretion of the commissioner, be carried out on a sectional or regional basis, as indicated by need, subject to overall completion in an expeditious fashion subject to the terms of this chapter. This map, and any orders issued pursuant to the provisions of this article, shall comprise a part of the statewide en-

vironmental plan as provided for in section 3-0303 of this chapter. As soon as practicable the commissioner shall file with the secretary of state a detailed description of the technical methods and requirements to be utilized in compiling the inventory, and he shall afford the public an opportunity to submit comments thereon.

2. Upon completion of a freshwater wetlands inventory, the commissioner shall prepare a tentative freshwater wetlands map delineating the boundaries of such wetlands as determined by the study and inventory conducted pursuant to subdivision one of this section. The map may be prepared for different sections or regions of the state separately, as the commissioner shall determine. The agency in the preparation of a tentative freshwater wetlands map fro any area within the Adirondack park.

3. The tentative freshwater wetlands map shall set forth the boundaries of such wetlands as accurately as is practicable to inform the owners thereof, the public and the department of the approximate location of the actual boundaries of the wetlands, subject to motion for delineation pursuant to this section, or more precise definition thereof in the discretion of the commissioner. The commissioner shall take into consideration, whenever possible, the boundaries of the local government or governments within which the wetlands are located.

4. Upon completion of the tentative freshwater wetlands map for a particular area, the commissioner or his designated hearing officer shall hold a public hearing in that area in order to afford an opportunity for any person to propose additions or deletions from such map. The commissioner shall give notice of such hearing to each owner of record as shown on the latest completed tax assessment rolls, of lands designated as such wetlands as shown on said map and also to the chief administrative officer and clerk of each local government within the boundaries of which any such wetland or a portion thereof is

located and, in the case of a tentative freshwater wetlands map for any area within the Adirondack park, to the Adirondack park agency, by certified mail not less than thirty days prior to the date set for such hearing and shall assure that a copy of the relevant map is available for public inspection at a convenient location in such local government. The commissioner shall also cause notice of such hearing to be published at least once, not more than thirty days nor fewer than ten days before the date set for such hearing, in at least two newspapers having general circulation in the area where such wetlands are located.

5. After considering the testimony given at such hearing and any other facts which may be deemed pertinent, after considering the rights of affected property owners and the ecological balance in accordance with the policy and purposes of this article, and, in the case of wetlands or portions thereof within the Adirondack park, after consulting with the Adirondack park agency, the commissioner shall promulgate by order the final freshwater wetlands map. Such order shall not be promulgated less than sixty days from the date of the hearing required by subdivision four hereof. A copy of the order, together with a copy of such map or relevant portion thereof shall be filed in the office of the clerk of each local government in which each such wetland or a portion thereof is located and, in the case of a map for any area within the Adirondack park, with the Adirondack park agency. The commissioner shall simultaneously give notice of such order to each owner of lands, as shown on the latest completed tax assessment rolls, designated as such wetlands by mailing a copy of such order to such owner by certified mail in any case where a notice by certified mail was not sent pursuant to subdivision four hereof, and in all other cases by first class mail. The commissioner shall also give notice of such order at such time to the chief administrative officer of each local government within the boundaries of which any such wetland or a portion thereof is located. At the time of filing with such clerk or clerks, the commissioner shall also

cause a copy of such order to be published in at least two newspapers having general circulation in the area where such wetlands are located.

6. Except as provided in subdivision eight of this section, the commissioner shall supervise the maintenance of such boundary maps, which shall be available to the public for inspection and examination at the regional ofice of the department in which the wetlands are wholly or partly located and in the office of the clerk of each county in which each such wetland or a portion thereof is located. The commissioner may readjust the map thereafter to clarify the boundaries of the wetlands, to correct any errors on the map, to effect any additions, deletions or technical changes on the map, and to reflect changes as have occurred as a result of the granting of permits pursuant to section 24-0703 of this article, or natural changes which may have occurred through erosion, accretion, or otherwise. Notice of such readjustment shall be given in the same manner as set forth in subdivision five of this section for the promulgation of final freshwater wetlands maps.

7. Except as provided in subdivision eight of this section, the commissioner may, upon his own initiative, and shall, upon a written request by a landowner whose land or a portion thereof may be included within a wetland, or upon the written request of another person or persons or an official body whose interests are shown to be affected, cause to be delineated more precisely the boundary line or lines of a freshwater wetland or a portion thereof. Such more precise delineation of a freshwater wetland boundary line or lines shall be of appropriate scale and sufficient clarity to permit the ready identification of individual buildings and of other major man-made structures or facilities or significant geographical features with respect to the boundary of any freshwater wetland. The commissioner shall undertake to delineate the boundary of a particular wetland or wetlands, or a particular part of the

boundary thereof only upon a showing by the applicant wherefor of good cause for such more precise delineation and the establishment of such more precise line.

8. The supervision of the maintenance of any freshwater wetlands map or portion thereof aplicable to wetlands within the Adirondack park, the readjustment and precise delineation of wetland boundary lines and the other functions and duties ascribed to the commissioner by subdivisions six and seven of this section shall be performed by the Adirondack park agency, which shall make such maps available for public inspection and examination at its headquarters.

6 New York Codes, Rules and Regulations, %664.7(a) (2) (i):

664.7 Freshwater wetlands map maintenance, amendment and adjustment.

(a) Procedures. (1) The commissioner shall supervise the maintenance of each map. Maps shall be available for public examination at the appropriate regional office of the department and in the office of the clerk of each county in which each wetland or a portion thereof is located. They will also be filed with each appropriate local government.

(2) The commissioner may, upon request by any person having evidence such as photographs of the area in question, or upon department initiative, issue an order amending or adjusting any map for the following reasons and under the following circumstances:

(i) The commissioner may amend a map by adding a previously unmapped or newly created wetland to the map, by significantly expanding or contracting the boundaries of a wetland shown on the map, or by deleting a wetland

from the map, all as may be necessary to conform the map to actual onsite conditions. This will be done only after a copy of the proposed amended map has been made available for public inspection in the appropriate regional office of the department and in the office of the clerk of each affected local government, and only after the commissioner has provided notice of the proposed amendment and an opportunity for a public hearing on the proposal. The notice shall be sent by certified mail, not fewer than 30 days prior to any such hearing, to each owner of record, as shown on the latest completed tax assessment rolls, of land involved in the proposed amendment and also to the chief administrative officer and clerk of each affected local government. Notice of the proposed amendment shall also be published at least once in at least two newspapers having a general circulation in the area that is the subject of the proposed amendment, and also in the department's environmental notice bulletin. If a hearing is scheduled, notice shall be provided to the same parties, and also published, in the same manner, not more than 30 nor fewer than 10 days before the date set for the hearing. Once the announcement of a proposed amendment has been made, no activity subject to regulation pursuant to the act shall be initiated within the area that is the subject of the proposal until the commissioner has either amended the map or denied the amendment. However, no activity which has already been initiated at the time of the announcement, within an area that is proposed as an addition to the map, will be subject to such regulation.

STATEMENT OF THE CASE

A. *The Freshwater Wetlands Act*

The freshwater wetlands law was adopted by the legislature in 1975. The legislature stated in ECL 24-0103 that

> "[i]t is declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands and to regulate use and developments of such wetlands to secure the natural benefits of freshwater wetlands *consistent with the general welfare and beneficial economic, social and agricultural development of the state.*" (Emphasis supplied).

As the commentaries to the statute note "[t]his declaration of the acts policy plainly calls for a balancing between the environmental concerns embodied in the legislative finding of 24-0105 and the legitimate needs of economic, social and agricultural development." The legislature clearly recognized the need for the protection of wetlands balanced against the necessity for continued growth and development of the State. The legislative minutes themselves state that the purpose of the bill is "to foster, promote, create and maintain harmonious environmental conditions . . .

> (c) while promoting patterns of development and technology which minimize adverse impact on the environment."

The Courts have also recognized this balancing of environmental concerns against societal needs for growth and development. *See Drexler v. Town of New Castle,* 62 NY2d 411 (1984); *Spears v. Berle,* 48 NY2d 254 (1979).

The primary goal in enacting the bill was to preserve unique environmental qualities while fostering growth and development throughout the state in conjunction with environmental concerns. The legislature recently adopted an addendum to Section 24-1104 of the Freshwater Wetlands Laws; the new bill further emphasizes the legislature's concern with balancing environmental protection against

the interests of landowners.[1] The Legislature, specifically concerned with the 1986 freshwater wetlands maps filed in Richmond County recognized the new map as well as the procedures involved in preparing the map as presenting an "undue hardship" for property owners. The public policy interests were redefined and changed from preservation of freshwater wetlands to preservation of "critical" wetlands balanced against the "just interests of landowners." The legislature clearly wanted to address the DEC's administration and application of the ECL Laws with regard to Richmond County landowners and take a stronger stance as to the legislative intent in adopting the laws. The legitimate interests of landowners were not to be overlooked or sacrificed in order to protect wetlands, particularly marginal areas.

The legislature went even further and changed the burden of proof standards necessary to justify mapping of land as freshwater wetlands. Individual lots less than 10,000 acres require clear and convincing evidence while on larger lots proof amounting to a preponderance of the evidence is necessary.

With regard to the original ECL laws the legislature directed that in order to accomplish the task of identifying freshwater wetlands the commissioner of the Department of Environmental Conservation should "as soon as practicable," conduct a study to identify and map wetlands in the state 24-0301(1). Areas to be mapped included lands comprising 12.4 or more acres, or if less than 12.4 acres having characteristics making the land of "unusual local importance." In order to have unusual local importance, the land mass involved had to fulfill certain criteria which was to be determined on a case by case basis. The

1. Chap. 408, L. of 1987. Effective September 1, 1987.

legislature directed that the mapping not be done on a piecemeal basis but "on a sectional or regional basis, subject to overall completion in an expeditious fashion" 24-0301(1). The language of the statute shows that the legislature intended the mapping process to proceed post haste. Over and over again there is an expressed intent that the commissioner proceed "as soon as practicable" and in an "expeditious manner." The Statute has now been in effect twelve years and the commissioner has only recently adopted a final map for Richmond County.[2]

Upon completion of the freshwater wetlands inventory the ECL laws provide that a tentative freshwater wetlands map delineating the freshwater wetlands boundaries shall be prepared. 24-0301(2). The DEC filed said tentative map for Richmond County in March, 1981. The map was never amended or changed from the date of its original filing up to the Spring of 1986. The DEC never made any announcement of its intention to change the maps during this five year span. ECL 24-0301(6) provides that if amendments are to be made to the maps announcements of the intended changes must first be made.

After the filing of the maps, a public hearing shall take place to afford an opportunity for persons to propose additions to or deletions from such map. 24-0301(4). Public hearings for the freshwater wetlands maps filed in Richmond County were held in the Spring of 1981. After considering the testimony given at such hearing "the commissioner *shall* promulgate by order the final freshwater wetlands map," 24-0301(5). To date, the DEC commissioner has failed to promulgate by order the 1981 freshwater wetlands map for Richmond County as the final map.

2. Final map filed September 1, 1987.

After filing the completed map the legislature provided a framework by which amendments could be made to the map. Such changes could be effected to clarify boundaries, correct errors, effect technical changes and to reflect changes as a result of granting permits ECL 24-0301(6). Said map readjustment cannot be implemented until *after* notice is given and a *public hearing* held. 24-0301(6).

Additionally DEC regulation 6NYCRR 664 delineates the methods that must be employed to effect changes to the freshwater wetlands map. 6 NYCRR 664.7(a)(2)(i) states amendments are to be made "only after a copy of the proposed amended map has been made available for public inspection in the appropriate regional office of the Department and in the office of the Clerk of each affected local government, and only after the commissioner has provided notice of the proposed amendments and an opportunity for a public hearing on the proposal." The statute clearly provides for a predeprivation hearing. Furthermore, the regulations have a grandfather clause which states that "no activity which has already been *initiated* at the time of the announcement of the amendment, within an area that is proposed as an addition to the map, will be subject to such regulation." 6 NYCRR 664.7(a)(2)(i).

The legislature made no provision for the amendment of a tentative freshwater wetlands map. The interim permit procedures contemplated by the legislature clearly had applicability prior to the filing of a freshwater wetlands map. Thereafter if an amendment was to take place, an "announcement" of same had to be made, prior notice given and a hearing held before the amendments could be made. ECL 24-0301(6), 6NYCRR 664. The legislature was concerned with completing the initial mapping process as soon as possible in order to preserve true freshwater

wetlands and to avoid ambiguity on the part of the public as to whether land would or would not be mapped. It was contemplated that a map would be filed after completion of the mapping process and that thereafter, the amendment mechanism would become effective. The legislature made no provision for more than one filing of tentative maps and it clearly was not their intent that more than one tentative filing would occur. Since the legislature specifically addressed two alternatives and established procedures to implement those alternatives it cannot be presumed that a third alternative was contemplated by the legislature in adopting the statute. After the filing of a map, changes were to be made by amendment which require prior notice and hearing.

B. Facts

In October 1984 petitioners-appellants purchased premises known as 176 South Goff Avenue and listed on the tax maps for Richmond County as Block 6793 Lot 43. The lot is residentially zoned for one-family homes. It is in a residential neighborhood surrounded by one-family homes. Petitioners-appellees herein have lived across the street from the lot for over twenty-two years. The lot was purchased in 1984 for the purpose of building a one-family dwelling on the lot as a retirement home for landowners and to enable them to stay in the neighborhood. The purchase was consummated after the appropriate title searches were conducted and an architect retained who drafted plans for the home. The lot had no liens or encumbrances on it and it did not appear on the 1981 freshwater wetlands map filed in the County Clerk's office in Richmond County. As a matter of fact, not a single piece of land in landowners' town (Pleasant Plains) appeared on said map. Thereafter, the architect retained by landowners completed his plans, a builder was hired

and landowners proceeded to obtain all the requisite permits to build their home. The land was excavated (pursuant to the South Richmond Plan), perk test conducted, building supplies purchased and construction started.

On October 3, 1985, DEC officer William Pitcher arrived on landowners' property and ordered construction to stop. When questioned by landowners' daughter, Laurel Wedinger, an attorney, as to the basis for such order, he stated he was not sure if the property was a wetland or even if it was adjacent to a wetland. Mr. Pitcher also indicated he was not sure if the cut-off point was 100 feet or 500 feet. He stated he was sent to the property based on a phone call although he did not know who placed the call. Mr. Pitcher said that landowners should call the DEC office to get more information. Ms. Laurel Wedinger placed the call in front of Mr. Pitcher and asked for the parties Mr. Pitcher indicated would have the information. She was told that none of the proper parties were in the office and that she should call at another time. Mr. Pitcher left the premises and he did not stop the construction that was going on nor did he issue any violations.

Thereafter on October 22nd, 1985 landowners' daughter, Debra Wedinger, and son, Dr. Robert S. Wedinger,[3] went to the DEC office to inquire about the parcel in question. On said date they were informed by Joseph Pane, Senior Environmental Analyst for the DEC, that their property was not a designated wetland. At that time the DEC provided the Wedingers with a copy of the

3. Dr. Robert Wedinger is also a scientist with degrees in biology and chemistry from Wagner College, Stonybrook University and Harvard University. He is presently employed in Agricultural Research at FMC Laboratories. In his opinion, the parcel in question is not a freshwater wetland and it was his intent to review the scientific data upon which DEC personnel based their determination.

wetlands map for the area dated May 24, 1985 which clearly indicated petitioners were not within the "100 foot" zone subjecting it to regulation.

Additionally, the DEC provided the two with a copy of a letter which had been sent to all area residents whose land had been designated wetlands. Landowners were never sent a copy of said letter.

On October 23, 1985, pursuant to ECL 24-0703(5) and 6NYCRR 662.4(d), landowners' attorney sent a letter to the DEC office seeking written confirmation of the determination that petitioners' property was not a designated "wetland." Said letter has never been responded to in violation of the above cited statutes, which also require that if a parcel is designated freshwater wetland the reasons and evidence upon which the designation was based must be provided.

On October 28, 1985 a letter dated October 21, 1985 was sent to the home of landowners' attorney which contained an order to cease and desist and which was signed by DEC Assistant Regional Attorney Helene G. Goldberger. The letter directed that landowners arrange a "compliance meeting" with DEC personnel. On October 28, 1985 Laurel Wedinger called the DEC office and spoke with a Mr. Cryan in order to arrange for the "compliance meeting." Mr. Cryan indicated that he was not aware of the case and that he would have either Helene Goldberger, DEC staff attorney, or Wayne Richter, biologist return the phone call. The call was not returned. Laurel Wedinger was again in touch with the DEC office on November 1, 1986 and after three phone calls, she spoke with staff attorney Helene Goldberger. A meeting was arranged for November 6, 1985. The meeting was attended by both landowners, Laurel Wedinger and Dr. Robert S.

Wedinger.[4] At said meeting a request was again made for a written response to the letter sent October 23, 1985 as to the freshwater wetlands designation on landowners' property.

At the compliance meeting of November 6, 1985, it was determined that a possible compromise could be achieved between the landowners and the DEC which would allow construction to proceed with certain modifications of the construction plans. Landowners agreed to a compromise as the daily delays in construction was becoming very costly. In a good faith effort to resolve the matter landowners met with DEC biologist Wayne Richter and Senior Environmental Analyst Jeffrey Rabkin on November 13, 1985. At that time a compromise was reached wherein landowners agreed to certain modifications of the construction plans in order to meet the environmental requirements of the DEC. Additionally, landowners agreed to leave certain areas of their property in its natural condition and to plant vegetation selected by the DEC. Landowners contacted their architect and the revised plans were ready for submission the following day.

Thereafter, on November 14, 1985 Laurel Wedinger was informed by Mr. Jeff Rabkin that the DEC compromise was withdrawn and that the DEC would not support any permit submitted by landowners to construct a home on the lot. He stated that when the verbal agreement was reached he was not fully aware of his Department's position.

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4. Once again, Dr. Wedinger attended the meeting in order to review DEC's scientific data with regard to the property in question. DEC personnel refused to supply and/or discuss this information.

C. PROCEEDINGS BELOW

The appellants filed an Article 78 proceeding on November 26, 1985 based on the arbitrary and capricious acts of the DEC as well as their failure to provide notice of the mapping of appellants property. The petition was granted by the Hon. Charles A. Kuffner, Jr. on February 28, 1986.[5]

The decision was largely based on the DEC's failure to provide the petitioner-appellant's with due process protections required by the U.S. Constitution.

The DEC appealed Judge Kuffner's decision[6] to the Appellate Division, Second Department who reversed the Order by Decision and Order dated April 20, 1987.[7] Petitioner-appellants moved the Appellate Division, Second Department for permission to appeal to the Court of Appeals for the State of New York which motion was granted by Order dated July 7, 1987.[8] The Court determined that questions of law had arisen which should have been reviewed by the Court of Appeals.

The Court of Appeals entertained the appeal and rendered a Decision dated March 22, 1988.[9] The Decision

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5. Copy of Judge Kuffner's decision and order are located in the Appendix at pages 1a-16a.

6. Copy of Notice of Appeal is located in the Appendix at pages 17a-18a.

7. Copy of Appellate Division Opinion is located in the Appendix at pages 19a-27a.

8. Copy of Order on Motion located in Appendix at pages 28a-29a.

9. Copy of Court of Appeals Decision located in Appendix at pages 30a-40a.

of the Court of Appeals concluded that petitioner-appellants were not entitled to notice and a hearing after maps which had been filed in the County Clerk's Office were amended. The Court of Appeals Decision affirmed the findings of the Appellate Division, Second Department.

The instant petition for certiorari results from that Order of Affirmance.

I. THE COURT OF APPEALS FOR THE STATE OF NEW YORK HAS INTERPRETED THE NEW YORK ENVIRONMENTAL CONSERVATION LAWS DEALING WITH FRESHWATER WETLANDS IN A MANNER THAT RUNS CONTRARY TO THE UNITED STATES CONSTITUTION.

One of the primary issues raised by appellants at the Court of appeals level was the fact that the DEC was violating constitutional safeguards built into the environmental conservaion laws by failing to adopt a "final" freshwater wetland map but instead filing successive "tentative" freshwater wetland maps without providing notice and a hearing under New York ECL §24-0301(6),[10] after a freshwater wetlands map is filed in the County Clek's Office of the area mapped, changes and said map can be affected to clarify boundaries, correct errors, effect technical changes, and to reflect changes as a result of granting permits. Said map readjustment cannot be implemented until after notice is given and a public hearing held.

10. Full statute set forth at pages 3-7.

Additionally, DEC regulation 6 NYCRR §664.7(a)(2)(i)[11] states that amendments are to be made "only *after* a copy of the proposed amended map has been made available for public inspection in the appropriate regional office of the Department and in the office of the clerk at each affected local government and *only after* the commissioner has provided notice of the proposed amendments and an opportunity for a public hearing on the proposal . . ." (emphasis added)

With regards to Richmond County, the DEC bypassed the amendment process by claiming that the maps were new tentative maps (albeit filed five years after the original maps) and they were allowed the discretion to file successive tentative maps without promulgating a final map even thought there was no statutory authority for this position. The Court of Appeals agreed with the DEC. By decision dated March 22, 1988[12] the Court of Appeals held[13] "[t]he trial court's view that each landowner was entitled to an individual hearing upon tentative designation at its wetlands finds no support in the statute or in the fair and practical implementation of this statutory scheme. It erroneously relied in this respect on 6 NYCRR Part 664.7(a)(2)(i) which requires individual hearings only prior to *amendment* of a *final map,* a situation not present or pertinent here."

It is respectfully submitted that the Court of Appeals erroneously interpreted the statute making same irreconciliable with prior Supreme Court precedent requiring more and an opportunity to be heard.

11. Full regulation set forth at pages 7-8.
12. Full opinion located in Appendix at pages 30a-40a.
13. See page 38a of the Appendix.

"Although '[m]any controversies have raged about the cryptic and abstract words of the due process clause,' as Mr. Justice Jackson wrote for the Court in *Mullone v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), 'There can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Id.* at 313, *Boddie v. CT.*, 401 U.S. 371, 377-378 (1970).

The decision of the court of Appeals, as stated above is inconsistent with the due process clause of the United States. Based on this fact, as well as the Court 3 failure to adhere to U.S. Supreme Court Procedent it is requested that the instant petition for certioran be granted.

In *Bell v. Burson,* 402 U.S. 535, this court held that "[a] pnor hearing always imposeses some costs in time, effort and expense and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right." *Id.* at 540-541. "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken." *Goldberg v. Kelly,* 397 U.S. 254, 261 (1969).

Undeviating precedent of this Court establishes the right to notice and a hearing before property is taken. In the case of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1981) this Court stated "[e]ach of our due process cases has recognized either explicitly or implicitly that because 'minimum [procedural] requirements [are] a matter of federal law they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to

adverse official action,' citing *Vitek v. Jones,* 445 U.S. 480, 491 (1980). See *Arnett v. Kennedy,* 416 U.S. 160, 166-167 (Powell, J. concurring in part) *Id.* at 211 (Marshall, J. dissenting).

"If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois,* 405 U.S. 645, 647."

Since the New York Court of Appeals, the highest court for the State has validated state procedures which are inconsistent with Supreme Court precedent it is requested that certiorari be granted to her. One issue, the federal question was direct decided by the Court.

Where a state court does not decide against an appellant on an independent state ground, but deeming the federal question to be before it, actually decides that question adversely to the federal right asserted, the Supreme Court has jurisdiction to review the judgment if it is final. *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed. 2d 306 (1979).

The Court of Appeals recognized that "[o]nce promulgated, a final map may even be amended by the commissioner to correct any deficiencies and to effect any additions, deletions or technical changes on the map. Prior

to amending a final map, however, the commissioner must first provide to each owner of record further notice and opportunity to be heard [ECL §24-0301(6); *see also* 6 NYCRR Part 664].[14] Even recognizing this provision, the Court still determined that the DEC's procedure in circumventing the constitutional safeguards by failing to adopt a final map, was legitimate. The Courts' ruling cites neither federal nor state law.

> "[W]hen a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 3472 (1983).

A review of the paragraph preceding the court's determination that notice was not required before new maps were filed reveals that the court was relying on federal law. Although the case of *First English Evangelical Church of Glendale v. County of Los Angeles,* __ U.S. __, 107 S.Ct. 2378 (1987) is cited, it is not used to directly support the court's decision concerning due process. Significantly however, no state law is relied upon or even cited. There is no indication that the state court decision clearly and expressly based on bona fide, separate, adequate and independent state grounds. Without this crucial clarification, the Supreme Court has jurisdiction to hear the matter. "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases

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14. See Appendix at page 33a.

are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached" *Id.* at 1041, 103 S.Ct. at pg. 3476.

Since the Court of Appeals makes no reference to independent state grounds as the controlling factor behind its decision and due to the fact that the opinion reached is inconsistent with prior Supreme Court rulings appellants respectfully submit that the Supreme Court of the United States has jurisdiction to hear this matter. The rights involved affect the citizens throughout the State of New York. The manner in which the Court of Appeals has construed the statute violates constitutional due process to the citizens whose property is taken without notice and a hearing.

II. THE DECISION OF THE COURT OF APPEALS RUNS CONTRARY TO THE SUPREME COURT'S RULING IN THE CASE OF *FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH V. COUNTY OF LOS ANGELES*

Similar to this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles, supra,* appellants raised the point that the self-executing nature of the Freshwater Wetlands Act amounted to a taking. The taking issue was first raised at the original filing of appellants Article 78 proceeding. The Court below determined that the taking issue was not ripe for review,[15] as did the Appellate Division, Second Department.[16] The Court of Appeals, in addressing the issue held that *First Evangelical* was inapposite to the taking argument since

15. See pages 15a-16a of Appendix.

16. See page 25a of Appendix.

appellants had not sought, and been denied, a permit to build. Appellants contend that this decision runs contrary to the ruling in *First Evangelical*. In *First Evangelical,* as in the present action, the ordinance itself affects a taking. The mapping of a parcel as a freshwater wetland effectively prohibits any viable use of that property.

As this Court held, " 'It would be a very curious and unsatisfactory result if . . . it shall be held that if, one government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation because in the narrowest sense of that word it is not taken for public use.' " *Id.* at 2383 citing *Pempelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872).

The Court of Appeals, in the decision reached, addresses the taking issue, however decides that issue contrary to *First Evangelical*. It is submitted that although the decision on this issue is cloaked around a state procedure, the ultimate question being resolved is a federal one. The Court of Appeals decided that regardless of the fact that landowners have been advised by DEC shift that a permit to build would never be granted as well as the fact that the mere mapping of a piece of land on a freshwater wetlands map prohibits all use of that property immediately upon mapping, appellants still had to seek and be denied a permit. The appellants in *First Evangelical* were not required to go through such a process and in fact they filed their complaint immediately after passage of the contested ordinance. In the present action, as in *First Evangelical,* it is submitted that the self-executing nature of the statute prohibits all use of property mapped as a freshwater wetlands.

Since the Court of Appeals has interpreted the taking issue based on federal law this Court has jurisdiction to hear the matter. Even though the decision below is intertwined around a state procedure, the basis for the decision clearly and unequivocably sounds in federal law. It should also be noted that there is no plain statement that the decision below rested on independent state ground. It appears "that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did' " *Michigan v. Long, supra,* 463 U.S. at pg. 1044, 103 S.Ct. at pg. 3478, citing *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed. 2d 965 (1977).

Based on the foregoing it is respectfully submitted that the Supreme Court of the United States has jurisdiction to hear this matter and the within petition for certiorari should be granted.

CONCLUSION

SINCE THE NEW YORK COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS CONTRARY TO SUPREME COURT PRECEDENT IT IS SUBMITTED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO HEAR THE MATTER, AND THE INSTANT PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

LAUREL A. WEDINGER
Attorney for Petitioners-Appellants

APPENDIX A—ORDER AND JUDGMENT SUPREME COURT, RICHMOND COUNTY DATED FEBRUARY 28, 1986

At a Special Term, Part I of the Supreme Court, held in and for the County of Richmond, at the Courthouse, Richmond County, New York on the 28th day of February, 1986.

Present:

Hon. Charles A. Kuffner, Jr.,

Justice.

In the Matter

Of

The Application of ROBERT H. and BEATRICE A. WEDINGER,

Petitioners,

For a Judgment under Article 78 of the Civil Practice Law and Rules

-against-

HELENE G. GOLDBERGER, ASSISTANT REGIONAL ATTORNEY, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; WAYNE RICHTER, BIOLOGIST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOSEPH J. PAYNE, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JEFF RABKIN, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION and THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, HENRY G. WILLIAMS, COMMISSIONER,

Respondents.

ORDER & JUDGMENT
Index No. SP 735/85

A petition having been made by petitioners ROBERT H. and BEATRICE A. WEDINGER for a judgment in their favor pursuant to Article 78 of the CPLR, and an answer having been interposed on behalf of the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ("DEC") and several of its employees,

NOW, upon reading and filing the Notice of Petition dated November 26, 1985, the Verified Petition of ROBERT H. WEDINGER and BEATRICE A. WEDINGER, sworn to on the 26th day of November, 1985, together with Exhibits annexed thereto, Petitioner's Memorandum in Support of Petition, dated November 26, 1985, the Verified Answer of the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ("DEC") and several of its employees, together with Exhibits annexed thereto, and the Reply Affidavit of Laurel A. Wedinger, Esq., sworn to the 16th day of December 1985, together with Exhibits annexed thereto and upon the papers and proceedings had herein,

AND, said petition having duly come on to be heard before this Court on the 17th day of December, 1985, and due deliberation having been had therein,

NOW, on motion of John S. Zachary, P.C., attorneys for petitioners, ROBERT H. and BEATRICE A. WEDINGER, it is

ORDERED, ADJUDGED & DECREED as set forth in the Court's Memorandum Decision dated February 18, 1986, that petitioners' petition is granted to the following extent:

1. The Department of Environmental Conservation's cease and desist order dated October 21, 1985 is vacated and annulled.

2. The petitioners' property is not subject to Department of Environmental Conservation's jurisdiction and enforcement.

3. Petitioners may proceed to develop the subject property without Department of Environmental Conservation approval or permit, subject, of course, to any other approvals or permits by other agencies having jurisdiction.

ENTER
s/ Charles A. Kuffner, Jr.
CHARLES A. KUFFNER, JR.
J.S.C.

APPENDIX B—MEMORANDUM DECISION OF THE HONORABLE CHARLES A. KUFFNER, JR., JUSTICE OF THE SUPREME COURT RICHMOND COUNTY DATED FEBRUARY 18, 1986

BY: KUFFNER, J.S.C.
DATE: February 18, 1986
Index No.: SP735/85-SPECIAL TERM PART I

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

IN THE MATTER
OF
THE APPLICATION OF ROBERT H. AND BEATRICE A. WEDINGER,

PETITIONERS,

FOR A JUDGMENT UNDER ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

-AGAINST-

HELENE G. GOLDBERGER, ASSISTANT REGIONAL ATTORNEY, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; WAYNE RICHER, BIOLOGIST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOSEPH J. PAYNE, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JEFF RABKIN, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, HENRY G. WILLIAMS, COMMISSIONER,

RESPONDENTS.

This is a special proceeding in which the petitioners seek a judgment pursuant to Article 78 of the CPLR; 1) annulling a cease and desist order issued by the respondent, Department of Environmental Conservation (hereinafter the "DEC"); 2) determining that petitioners' property is not a wetland as defined in Article 24 of the Environmental Conservation Law; 3) preventing the Department of Environmental Conservation from further interference with construction on petitioners' property, or alternatively requiring it to commence condemnation proceedings.

The petitioners are in the process of constructing a home on their property at the corner of Stevenson Place and South Goff Avenue, Staten Island, New York. On October 21, 1985, the DEC sent a letter to petitioners' counsel directing that all activities, including clearing and filling of the property, cease and desist.

The issue before the Court although not directly raised by the parties, is whether the DEC has jurisdiction over petitioners' property. If it does, then it may enforce Article 24 of the Environmental Conservation Law as it pertains to this parcel, by requiring permits to conduct regulated activities (E.C.L. Section 24-0701(2)) by imposing civil penalties and cease and desist orders (E.C.L. Section 71-2303) and by seeking judicial enforcement (E.C.L. Section 71-2305). If not, the Department of Environmental Conservation has no jurisdiction over petitioners' property to enforce the Freshwater Wetlands Act.

A freshwater wetlands is land and water within the state *as shown on the freshwater wetlands map* (E.C.L. Section 24—0107(1)) (emphasis added). Thus, if the land or water in question is not shown on the freshwater wetlands map, it is not a freshwater wetlands by defini-

tion. Non-freshwater wetlands are not regulated by the Act.

What is a freshwater wetlands map? It is a map promulgated by the DEC pursuant to Section 24-0301 on which are indicated the boundaries of any freshwater wetlands (E.C.L. Section 24-0107(2)). An integral part of the promulgation procedure is the filing and availability for public inspection of the boundary maps at the DEC's regional office and in the office of the Clerk of each County in which such wetlands is located (E.C.L. Section 24-0301(6)). These maps shall be made available for public inspection, and the use of the word "shall" as used in subdivision six, is ordinarily mandatory in nature. (*People v. Gowasky,* 244 N.Y. 451, 466; *People v. Ricken,* 29 A.D. 2d 192, 287 NYS 2d 118). There is no other qualifying language in the statute indicating some other meaning. (*Matter of Mulligan v. Murphy,* 19 AD 218, 223, 241 NYS 2d 529, 534).

Section 24-0301 of the Act contains an elaborate scheme for promulgation of freshwater wetlands maps. The Commissioner of the Department is directed to conduct a study to identify and map freshwater wetlands within the state. Those wetlands he identifies constitute this State's wetlands inventory. Upon completion of the inventory, the Commissioner is directed to prepare a tentative freshwater wetlands map delineating the boundaries of such wetlands as determined by the aforementioned study and inventory. Subdivision 6 requires these boundary maps to be available to the public for inspection and examination at a regional DEC office *and* in the office of the County Clerk in each county in which an affected wetland is located.

The Court has determined, on its own investigation, that only one such tentative map has been filed in the Office of the Clerk of Richmond County on March 30, 1981. This map (actually, it is one map consisting of several sections, but they were filed together) delineated several wetlands areas throughout Richmond County. No other maps have ever been filed in the Office of the County Clerk of Richmond County. Petitioners' property is not designated as a wetland area on this map. Thus, as of the time of the filing of this tentative map, the subject property was not a freshwater wetland, and any attempt to regulate land not shown on such map is in excess of authority granted by the Act. (*People v. Bondi,* 104 Misc 2d 627, 429 NYS 2d 146).

The Legislature recognized that changed conditions might necessitate readjustment of the tentative maps (and for that matter, the final maps). Subdivision 6 gives the commissioner the authority to readjust the boundary maps so filed, in order to clarify the boundaries of the wetlands, to correct any error, to effect any additions, deletions, or technical changes on the map and to reflect any natural changes or changes which have occurred as a result of the granting of any permits. However, the power to readjust the maps is not unlimited. The commissioner may not arbitrarily and unilaterally readjust the tentative maps without violating procedural due process rights of property owners.

When this Act is applied to one's property, both the use of the property and its value are in serious jeopardy. The regulated activities are many (E.C.L. Section 24-0701(2)), and include draining, dredging, excavation, removal of soil, mud, sand, shells and gravel; also included are dumping, filling, depositing of soil, stones, sand, gravel, mud, rubbish and the erection of any structures,

roads, pilings, obstructions, septic tanks, sewers, and the discharge of any sewage treatment effluent. These activities are so far-raning in scope that it is safe to assume that any reasonable development or use of the land is precluded in the absence of a permit. If reasonable development is prohibited, the value of the property on the open market is surely impaired.

This Act is a form of zoning regulation. In fact, it requires the commissioner to promulgate land use regulations upon completion of the wetlands map. (E.C.L. Section 24-0903). These regulations must classify each wetland according to their most appropriate uses, and he shall prepare minimum land use regulations to permit only those uses compatible with their wetlands characteristics. These regulations have a potential to deprive one of the use and enjoyment of property unreasonably, and therefore constitutional due process protections must be afforded. (*Fred F. French Investing Co., Inc. v. City of New York,* 39 NY 2d 587, 385 NYS 2d 5; cert. denied, 429 U.S. 990, 97 S. Ct. 515); See also, *Seider v. Town of Islip,* 56 N.Y. 2d 1004 453 NYS 2d 636). Without a permit, the property will be rendered unsuitable for any reasonable income production or other private use for which it is adapted. Thus, the economic value will be destroyed if only a base residue of that valve remains (*Fred F. French Investing Co., Inc. v. City of New York, supra* at P. 596 and cases cited therein). Placing the bulk of one's property on a map which respondents have attempted to do, and which results in an inability to sell or deprives the owner of a substantial use of property can constitute a taking without due process of law (*Jensen v. City of New York,* 42 NY 2d 1079, 399 NYS 2d 645).

This is not to say that the actions of the respondents have already effectuated a deprivation of the reasonable

use of petitioners' property at this point in time. In order to have standing to challenge the validity of the ordinance or regulation, petitioners will have to apply for, and be denied, a permit from the DEC. (*Pichel v. Wells,* 38 AD 2d 632, 326 NYS 2d 887). This court is not passing on the issue of whether petitioners' property has been "taken" by the state as a result of respondents' actions. The only issue determined by this court is whether the DEC has jurisdiction over the property in light of its failure to afford minimal procedural due process protections afforded by the Environmental Conservation Law.

In addition, this is not to say that the DEC cannot act in furtherance of a legitimate state interest in protecting freshwater wetlands. It cannot act without affording some sort of procedural due process. In this regard, due process means at a minimum, notice and an opportunity to be heard. (*Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011; *Bradford Audio Corp. v. Pious,* 392 F.2d 67; *Bronson v. Consolidated Edison Co. of New York, Inc.,* 350 F. Supp. 443; *Jones v. Berman,* 37 NY 2d 42, 371 NYS 2d 422; *Harris v. Wyman,* 42 AD 2d 27, 344 NYS 2d 410; *Oberlander Perales,* 740 F2d 116).

The Legislature, perhaps recognizing that due process problems would arise if the DEC could readjust the maps without affording affected persons an opportunity to be heard, requires a certain procedure before a readjustment of any boundary map may be made. A tentative map is a "boundary map" as contemplated by subdivision six, since a tentative map must set forth the boundaries of designated wetlands (E.C.L. Section 24-0301(3)). This subdivision requires that ". . . [n]otice of such readjustment shall be given in the same manner as set forth in subdivision five of this section (Section 24-0301) for the promulgation of final freshwater wetlands maps." Subdivision five, in turn, states in pertinent part:

"*After considering the testimony given at such hearing* (emphasis added) and any other facts which may be deemed pertinent, after considering the rights of affected property owners and the ecological balance in accordance with the policy and purposes of this article . . . the commissioner shall promulgate by order the final freshwater wetlands map. Such order shall not be promulgated less than sixty days from the date of the hearing required by subdivision four hereof. A copy of the order, *together with a copy of such map or relevant portion thereof shall be filed in the office of the clerk of local government in which each such wetland or a portion thereof is located* (emphasis added) . . . The commissioner shall simultaneously give notice of such order to each owner of lands, as shown on the latest completed tax assessment rolls, designated as such wetlands by mailing a copy of such order to such owner by certified mail in any case where a notice by certified mail was not sent pursuant to subdivision four hereof, and in all other cases by first class mail. The commissioner shall also give notice of such order at such time to the chief administrative officer of each local government within the boundaries of which any such wetland or a portion thereof is located. At the time of filing with such clerk or clerks, the commissioner shall also cause a copy of such order to be published in at least two newspapers having general circulation in the area where such wetlands are located."

The hearing referred to in subdivision five is, in turn, referred to in subdivision four. It states in pertinent part:

"Upon completion of the tentative freshwater wetlands map for a particular area, the commissioner or his designated hearing officer shall hold a public hearing in that area in order to afford an opportunity for a person to propose additions or deletions from such map. The commissioner shall give notice of such hearing to each owner of record as shown on the latest completed tax assessment rolls, of lands designated as such wetlands as shown on

> said map and also to the chief administrative officer and clerk of each local government within the boundaries of which any such wetland or a portion there is located . . . by certified mail not less than thirty days prior to the date set for such hearing and shall assure that a copy of the relevant map is available for public inspection at a convenient location in such local government. The commissioner shall also, cause notice of such hearing to be published at least once, not more than thirty days nor fewer than ten days before the date set for such hearing, in at least two newspapers having general circulation in the area where such wetlands are located."

Consequently, when subdivision 3,4,5, and 6 of Section 24-0301 are read together as well as subdivisions 1 and 2 of Section 24-0107, it is clear that a public hearing with certain designated notice thereof by the DEC is required whenever it wishes to make changes in either a tentative freshwater wetlands and map filed with the County Clerk, or a final freshwater wetlands map. This interpretation is rational and reasonable under the circumstances, because the Legislature has made it clear that the public must be afforded a meaningful forum and an opportunity to be heard before any land located within the state are designated as wetlands. In essence, the DEC is creating a new map when it changes a previously filed map, and persons affected by those changes are entitled to some form of input into those decisions in order to satisfy minimal due process.

Again, it must be remembered that the above cited subdivisions are not designed as an emasculation of the DEC's power to readjust the maps that it files. They are intended as a reasonable limitation on any arbitrary or capricious action by the state in designating heretofore unregulated, privately owned property as protected wetlands.

It is clear from reading these subdivisions that such was the intention of the Legislature. The function of the court is to carry out that intention and put it into effect. (*Sharkey v. Thurston,* 268 N.Y. 123, *In Re Jannicky,* 209 N.Y. 413; *In Re Huntington's Estate,* 168 N.Y. 399; *Carr v. New York State Board of Elections,* 40 N.Y. 2d 556, 388 NYS 2d 87; *Baldine v. Gomulka,* 61 AD 2d 419, 402 NYS 2d 460, app. dism. 45 N.Y. 2d 818, 409 NYS 2d 208). The court must look to the enactment as a whole, and should give the words a meaning which serves, rather than defeats, the ends intended by the Legislature. (*MVAIC v. Eisenberg,* 18 NY 2d 1, 271, NYS 2d 641; *In Re Allcity Ins. Co.,* 66 AD 2d 531, 413 NYS 2d 929).

This statute, being in the nature of a zoning ordinance, and in derogation of the common law (*People v. Bondi, supra*) must be strictly construed. *Gibbs v. Arras Bros., Inc.,* 222 N.Y. 332; *People - ex rel. Abrams v. S.A. Schwartz Co.* 7 Misc 2d 635, 161 NYS 2d 1008; *Thomson Industries, Inc. v. Port Washington North,* 27 N.Y. 2d 537, 313 N.Y.S. 2d 117). All other factors being equal, this strict construction should be in favor of the property owner, where the statute is in derogation of common law property rights. (*Alfie's Fish & Chips v. Zoning Board of Appeals,* 36 AD 2d 664, 318 N.Y.S. 2d 107). In *Alfie's Fish & Chips,* a zoning ordinance provided that every amendment and map incorporated therein shall be entered in the minutes of the city council and published and posted. The Court held that petitioners, a property owner, was not required to use and rely on an unofficial map not promulgated pursuant to the ordinance, notwithstanding the intent of the city's council to change the zoning from business to residential.

This court is aware of the holding by the Third Department in *Tri Cities Industrial Park v. Commissioner*

of the Department of Environmental Conservation, 76 AD 2d 232, 430 NYS 2d 411). A cursory reading of that decision would seem to indicate that the DEC has broad jurisdiction to proscribe certain activity on property it deems to be wetland for the entire period prior to promulgation of a final map. A closer reading reveals a clear distinction between *Tri Cities* and the case at bar. In *Tri Cities,* no tentative map had been filed. The DEC was still in the "inventorying" stage (E.C.L. Section 24-0301(1)). Consequently, the Third Department never addressed the issue of how a filed tentative map can be changed, amended, etc., and it remains unresolved by the *Tri Cities* decision.

Therefore, this court holds that where a tentative map has been filed with a county clerk, the DEC has no jurisdiction over any lands or waters within the territory affected by such map unless it appears, and is clearly marked as such, as a freshwater wetland on that map. Of course, if the tentative map has been corrected, amended, changed, etc. after proper notice and a public hearing, and a readjusted map has been filed with the county clerk, then the lands and waters indicated on such readjusted map come under DEC jurisdiction.

In the case at bar, only one tentative map has been filed in the Office of the County Clerk in Richmond County, and petitioners' property is not designated as a freshwater wetland thereon. Consequently, the court holds that petitioners' property is not subject to any regulation by the DEC until such time as that agency files a properly readjusted map as indicated hereinabove.

It has been known to be a common practice by the DEC to attempt to designate lands on Staten Island on a piecemeal basis. A common scenario is as follows: An

owner of vacant property decides to develop it in some way, usually by building a residence. The bulldozers arrive, and begin excavation and/or fill work, as needed. Adjoining property owners then complain to the DEC, which sends down an employee to investigate the situation. He inspects the area, finds some characteristics of a freshwater wetland existing at the site (E.C.L. Section 24-0107(1)(a)), and reports such findings to his superiors. The DEC then unilaterally designates the area as a freshwater wetland, and so notifies the owner together with a cease and desist order.

Under this procedure, a property owner has no way of ascertaining whether his property shall be subject to wetland regulation until expenditures are made and work has actually commenced. A prospective property owner has no way of ascertaining whether his intended purchase is subject to regulation by the DEC until substantial expenditures for architects, engineers, attorneys, etc. have been made. By way of contrast, there are ways to acquire all other information necessary to ascertain the best use of the property, such as zoning restrictions, set-back restrictions, sewerage facilities, easements, liens, encumbrances, required frontage, height restrictions, square footage ratios, etc. by searching public records and documents. But not so vis-a-vis freshwater wetland regulation.

It is true that any person may inquire of the DEC as to whether any given parcel is, or will be, designated as a wetland subject to regulation. (E.C.L. Section 24-0703(5)). But even in the face of a negative response by the DEC, the property owner (or prospective owner) still cannot be certain as to whether or not the DEC will attempt to exercise jurisdiction over a given parcel. (See, *Matter of Waterside Associates (New York State Department of Environmental Conservation).* NYLJ, 2-4-86, p 13, col 5).

The Freshwater Wetlands Act became effective on September 1, 1975. Ten years have passed and no final freshwater wetlands map has been promulgated. Instead, the DEC has operated on a piecemeal basis, preparing tentative maps and inventorying freshwater wetlands of this state in phlegmatic fashion. This approach is contrary to the stated intentions of both the Legislature and the Governor, in approving the Act. The Act itself directs the commissioner to conduct his study of the States' freshwater wetlands as soon as practicable, and the study is subject to completion in an expeditious fashion. (E.C.L. Section 24-0301(1)). The Governor, in approving the enacting bill, anticipated that the study would be conducted quickly, for he stated that a permit from the DEC would be required to alter a freshwater wetland "after issuance of the official freshwater wetland map" (Governor's memorandum, 8-1-75, L. 1975 ch 614). Certainly, the Governor could not have anticipated that ten years would pass without permission of a final map. Greater achievements have been accomplished in less time.

If the Department of Environmental Conservation wishes to administer the Freshwater Wetlands Act as it was intended, it must proceed to promulgate the final map with greater earnest than it has in the past.

This petition is granted to the following extent:

1) the Department of Environmental Conservation's cease and desist order dated October 21, 1985 is vacated and annulled.

2) the petitioners' property is not subject to Department of Environmental Conservation's jurisdiction and enforcement.

3) petitioners may proceed to develop the subject property without Department of Environmental Conservation approval or permit, subject, of course, to any other approvals or permits by other agencies having jurisdiction.

Settle order.

s/ Charles A. Kuffner
J.S.C.

APPENDIX C—NOTICE OF APPEAL TO APPELLATE DIVISION, SECOND DEPARTMENT DATED MARCH 4, 1986

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

IN THE MATTER
OF
THE APPLICATION OF ROBERT H. AND BEATRICE A. WEDINGER,
PETITIONERS,

FOR A JUDGMENT UNDER ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

-AGAINST-

HELENE G. GOLDBERGER, ASSISTANT REGIONAL ATTORNEY, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; WAYNE RICHER, BIOLOGIST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOSEPH J. PAYNE, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JEFF RABKIN, SENIOR ENVIRONMENTAL ANALYST, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION HENRY G. WILLIAMS, COMMISSIONER,
RESPONDENTS.

NOTICE OF APPEAL
Index No. SP 735/85

S I R S:

PLEASE TAKE NOTICE that Respondents above named hereby appeal to the Appellate Division, Second Judicial Department, from the annexed order and judgment, (one document), entered on February 28, 1986, and from each and every part of said order and judgment.

Dated: New York, New York
March 4, 1986

ROBERT ABRAMS
Attorney General of
the State of New York
Attorney for Respondents
Ezra I. Bialik
Environmental Protection
Bureau
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TO:
COUNTY CLERK
COUNTY OF RICHMOND

JOHN S. ZACHARY, P.C.
75 Little Clove Road
Staten Island, NY 10301

APPENDIX D—ORDER AND DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT DATED APRIL 20, 1987

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

0536P
Z/ls

____ AD 2d ____ Argued—March 12, 1987

WILLIAM C. THOMPSON, J.P.
MOSES M. WEINSTEIN
JOSEPH J. KUNZEMAN
STANLEY HARWOOD, JJ.

2696E

In the Matter of Robert H. Wedinger, et al., respondents, v Helene G. Goldberger, et al., appellants.

DECISION & ORDER

Robert Abrams, Attorney General, New York, N.Y. (Ezra I. Bialik of counsel; Margaret L. Dorothy and Richard A. Kassel on the brief), for appellants.

John S. Zachary, P.C., Staten Island, N.Y. (Laurel A. Wedinger of counsel), for respondents.

Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y. (Edward N. Costikyan of counsel; Francisco E. Celedonio on the brief), for Grass Roots Organization, Inc., amicus curiae.

In a proceeding pursuant to CPLR article 78, *inter alia*, to review a cease and desist order dated October 21, 1985, issued by the New York State Department of Environmental Conservation (hereinafter the DEC), the appeal is from an order and judgment (one paper) of the Supreme Court, Richmond County (Kuffner, J.), dated

February 28, 1986, which granted the petition and determined that a certain parcel of real property owned by the petitioners was not subject to the DEC's regulation under the Freshwater Wetlands Act (ECL article 24).

ORDERED that the order and judgment is reversed, on the law, with costs, and the proceeding is dismissed.

It is undisputed that in 1981, the DEC prepared a tentative freshwater wetlands map for Richmond County as authorized by ECL 24-0301(2) and (3). The tentative map identified several wetland areas on Staten Island, but did not indicate that the property which is the subject of the instant proceeding contained wetlands. Although there is no statutory requirement that it do so, the DEC thereafter filed the map in the office of the County Clerk, Richmond County. Affected landowners and the general public were then given notice of a hearing to discuss the promulgation of a final freshwater wetlands map for Richmond County (*see*, ECL 24-0301[4]). Upon the conclusion of the public hearing, the DEC apparently continued the process of studying and designating additional wetland areas in the county, and no final map has as yet been promulgated by the Commissioner.

The petitioners are the alleged owners of a certain parcel of real property located in Richmond County. In 1985 they began to secure various approvals from local agencies for the construction of a single-family house on the parcel. After having some test borings performed on the property, the petitioners received a letter dated October 21, 1985 from the office of the DEC's regional attorney. The letter ordered them to cease all construction activities on the site because the property was subject to regulation under the Freshwater Wetlands Act (hereinafter the act) and a permit was required for the performance of

such work. After an informal attempt to compromise the matter with members of the DEC's regional staff proved fruitless, the petitioners, without seeking a permit, commenced the instant proceeding to set aside the cease and desist order and to prohibit the DEC from attempting to regulate the parcel. The petition alleged, *inter alia*, that the petitioners had expended significant sums of money in preparing to build on the property and that the DEC had failed to give them any prior notice that the parcel contained wetland. The petitioners further claimed that the DEC's interim designation of the property as wetlands was arbitrary and capricious and constituted a deprivation of property without due process of law.

In its answer to the petition, the DEC averred that a locale in close proximity to the petitioners' property known as Bloeser's Pond was studied and tentatively mapped as a freshwater wetland area in May 1985 and a similar mapping of the petitioners property was performed in August 1985. While the tentative designation of these areas as wetlands was made in the DEC's regional office and was not reflected on the copy of the 1981 tentative map filed in the County Clerk's office, the DEC maintained that it was authorized by the act to make additional wetlands designations at any time prior to the promulgation of the final map for the county, and that notice and a hearing would be provided to all affected landowners and to the petitioners prior to the promulgation of a final map by the commissioner. The DEC also stated that its designation of the property as wetland was accurate and suggested that the petitioners apply for an interim permit to develop the property.

The Supreme Court, Richmond County, subsequently issued a decision granting the petition (*Matter of Wedinger v. Goldberger*, 131 Misc 2d 109). In doing so,

the court reasoned that the subject property did not fall within the definition of "freshwater wetlands" as found in ECL 24-0107(1) and could not be regulated by the DEC because it was not listed as a wetlands area on the 1981 tentative map filed in the County Clerk's office. The court further found that the DEC's 1985 designation of the petitioners' property was the equivalent of a map amendment under ECL 24-0301(6), and as such was invalid because it had not been preceded by notice and a hearing. We now reverse.

Contrary to the conclusion reached by the court of first instance, we find that the failure to designate the subject property as a wetlands area on the 1981 tentative map does not preclude regulation of the property pursuant to the act. While ECL 24-0107(1) defines "freshwater wetlands" in part as "lands and waters of the state as shown on the freshwater wetlands map", we construe this provision to refer only to that period of time *subsequent* to the promulgation of the final freshwater wetlands map. Prior to the promulgation of a final map, the DEC may continue to designate additional wetland areas, regardless of whether these areas are included in a tentative map filed in the County Clerk's office. The strict interpretation of ECL 24-0107(1), employed by the Supreme Court, Richmond County, conflicts with ECL 24-0703(5), which expressly provides that "[p]rior to the promulgation of the final freshwater wetlands map in a particular area *** no person shall conduct, or cause to be conducted, any activity for which a permit is required *** on any freshwater wetland unless he has obtained a permit from the commissioner'.. This language proscribes activity on freshwater wetlands prior to the adoption of a final map unless a permit is first obtained and "confers *** jurisdiction in [the] DEC for the entire period between the effective date of the act and promulgation of a final map" (*Matter of Tri Cities*

Ind. Park v. Commissioner of Dept. of Environmental Conservation, 76 AD2d 232, 235-236, *lv denied* 51 NY2d 706).

Additionally, the commissioner's regulations support the view that the DEC may seek to regulate wetlands at any time prior to the promulgation of a final map, regardless of whether the property is listed on a previously-filed tentative map. For example, 6 NYCRR part 662, which covers the time period prior to the adoption of a final map (*see, Goldhirsch v. Flacke,* 114 AD2d 998, *appeal denied* 67 NY2d 604), contains a definition of "freshwater wetlands" which only requires that wetland areas be listed as such in the DEC's regional office (*see,* 6 NYCRR 662.1[k]). Conversely, 6 NYCRR parts 663 and 664, which become applicable after a final map has been promulgated for a given area, expressly define "freshwater wetlands" in part as those areas which meet the aforementioned definition found in ECL 24-0107(1), that is, lands and waters of the State which are listed on the freshwater wetlands map (*see,* 6 NYCRR 663.2[1]; 664.2[f]). Hence, the commissioner has officially interpreted the act to mean that the restrictive definition of ECL 24-0107(1) applies only after the final map for a given area has been adopted. Prior to the adoption of a final map, the absence of a specific parcel of property from a tentative map does not preclude the DEC from subsequently designating and regulating that area as a wetland. It is firmly established that the construction given statutes by the agency responsible for their administration is entitled to great deference and shall be upheld if not irrational or unreasonable (*see, Matter of Haines v. Flacke,* 104 AD2d 26). We discern no basis for disturbing the commissioner's interpretation herein. The Freshwater Wetlands Act represents a legislative attempt to strike a balance between the preservation and protection of en-

vironmentally valuable lands and the rights of landowners (*see generally, Matter of Drexler v. Town of New Castle,* 62 NY2d 413; *Matter of Spears v. Belle,* 48 NY2d 254). Where, as here, no final map has as yet been promulgated by the commissioner, a limitation of the DEC's jurisdiction to only those wetlands which appear on a previously filed tentative map conflicts with the "tentative" nature of the map itself as well as with the statements of policy and findings contained within the act (*see,* ECL 24-0103, 24-0105).

For these reasons, we further conclude that the court of first instance erred in finding that the DEC could not make additional wetlands designations unless it first provided individual affected landowners with notice and a hearing to amend the 1981 tentative map. There is no discernable basis in the act for imposing a notice and hearing requirement upon the DEC whenever it wishes to alter a tentative map, for such a map is by its very nature subject to unilateral amendment by the DEC as that agency continues to inventory wetlands in a given area. Moreover, the mapping procedures embodied in ECL 24-0301 do not contemplate individualized hearings for property owners each ime the DEC updates the tentative map kept in its own offices, but instead direct only that a single public hearing be held for all landowners and the general public once the DEC has completed the tentative map and is prepared to promulgate a final map (*see,* ECL 24-0301[4], [5]). Additionally, the commissioner has rationally interpreted the map amendment procedures of ECL 24-0301(6) to apply only to the amending of *final* freshwater wetlands maps. Hence, 6 NYCRR 664.7, the regulation which governs the amendment of wetlands maps, is limited only to *final* maps by virtue of the definition of "freshwater wetlands map" which appears in 6 NYCRR 664.2(g). As such, the petitioners were not entitled to notice and a hear-

ing under the act prior to the tentative designation of their property as wetlands.

We likewise reject the petitioners' contention that prior notice and a hearing were required in order to provide them with due process of law. While it is axiomatic that a person cannot be deprived of property without due process of law, no cognizable deprivation has occurred herein, for the petitioners have not yet applied to the commissioner for an interim permit to use and develop the subject property nor has a final map been promulgated (*see, generally, United States v. Riverside Bayside Homes,* 474 US 121; *Church of St. Paul & St. Andrew v. Barwick,* 67 NY2d 510, *cert denied* 107 SCt 574; *Matter of Spears v. Berle, supra; Matter of Pichel v. Wells,* 38 AD2d 632). The mere tentative designation of the subject property as wetlands by the DEC's regional staff is insufficient, standing alone, to constitute a "taking" of the petitioners' land requiring due process of law. As such, the "taking" issue is not ripe for judicial review. Moreover, since the act provides for a full hearing prior to the granting o denial of a permit or the promulgation of a final map, the requirements of due process are satisfied by the act.

We further find unpersuasive the petitioners' equitable estoppel contention. Absent extraordinary circumstances, the doctrine of estoppel is inapplicable to a governmental entity which acts in its governmental capacity (*see, Matter of Daleview Nursing Home v. Axelrod,* 62 NY2d 30; *Matter of Hamptons Hosp. & Med. Center v. Moore,* 52 NY2d 88; *Hartford Ins. Group v. Town of N. Hempstead,* 118 AD2d 542). No such circumstances exist herein, for the 1981 wetlands map filed in the county clerk's office was clearly labeled a *tentative* map.

The factual contentions raised by the parties concerning the propriety of the DEC's interim designation of the subject property as wetlands cannot be resolved on the sparse evidence in the instant record and the proceeding must be dismissed. The petitioners' recourse is to apply to the commissioner for an interim permit or to await promulgation of the final map. A permit application is preferable, as such an application is not a concession that the DEC has jurisdiction over the subject property, and the petitioners will be free to contest the propriety of the designation with scientific and technical evidence at the ensuing permit application hearing (*see, e.g. Goldhirsch v. Flacke,* 114 AD2d 998, *supra; Harbour Point v. Flacke,* 104 AD2d 927, *lv denied* 64 NY2d 610). Moreover, the petitioners will also be entitled to demonstrate why they should be issued a permit if the act is applicable to their property, and the hearing record will provide the courts with an adequate basis for judicial review once an initial determination is made by the commissioner. We emphasize that we do not pass upon the merits of the parties' factual contentions; we merely note that the contentions cannot be intelligently resolved upon the present evidence and that they should be presented to the commissioner in the first instance, as they involve complex scientific data within his area of expertise.

Finally, the DEC should move with all possible haste to promulgate the final map.

THOMPSON, J.P., WEINSTEIN, KUNZEMAN and HARWOOD, JJ., concur.

Motion No. 1742

In the Matter of Robert H. Wedinger, et al., respondents, v. Helene G. Goldberger, et al., appellants.

DECISION & ORDER ON MOTION

Motion by the petitioners to expand the record on appeal from an order and judgment (one paper) of the Supreme Court, Richmond County (Kuffner, J.), dated February 28, 1986, to include two affidavits sworn to by them.

ORDERED that the motion is denied (*see,* 10 Carmody-Wait 2d §70:309; *Broida v. Bancroft,* 103 AD2d 88; *Liberty Mut. Ins. Co. v. Prudential Prop. & Cas. Ins. Co.,* 93 AD2d 814, *affd* 59 NY2d 1021).

THOMPSON, J.P., WEINSTEIN, KUNZEMAN and HARWOOD, JJ., concur.

ENTER:
MARTIN H. BROWNSTEIN
Clerk

APPENDIX E

DECISION AND ORDER ON MOTION GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK DATED JULY 7, 1987

Dated—July 7, 1987

WILLIAM C. THOMPSON, J.P.
MOSES M. WEINSTEIN
JOSEPH J. KUNZEMAN
STANLEY HARWOOD, JJ.

Motion No. 4803

In the Matter of Robert H. Wedinger, et al., respondents, v Helene G. Goldberger, et al., appellants.

DECISION & ORDER ON MOTION

Motion by respondents for leave to appeal to the Court of Appeals from an order of this court, dated April 20, 1987, which reversed an order/judgment of the Supreme Court, Richmond County, dated February 28, 1986.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted.

Questions of law have arisen, which in the opinion of this court ought to be reviewed by the Court of Appeals.

THOMPSON, J.P., WEINSTEIN, KUNZEMAN and HARWOOD, JJ., concur.

ENTER:
MARTIN H. BROWNSTEIN
Clerk

APPENDIX F—ORDER AND DECISION OF THE COURT OF APPEALS FOR THE STATE OF NEW YORK DECIDED MARCH 22, 1988

STATE OF NEW YORK
COURT OF APPEALS

2 No. 40

In the Matter of Robert H. Wedinger, et al.,

Appellants,

v.

Helene G. Goldberger, &c., et al.,

Respondents.

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2 No. 41

In the Matter of Dora Homes, Inc. et al.,

Appellants,

v.

Cyril M. Moore, Jr. &c., et al.,

Respondents.

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2 No. 42

In the Matter of Marine Equities Company, &c.,

Petitioner,

v.

Henry G. Williams, &c.,

Respondent,

Palmieri Brothers, Inc.,

Appellant.

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2 No. 43

In the Matter of Chesed Avrhom Hacohn Foundation, &c.,

Petitioner,

v.

Henry G. Williams, Commissioner &c.,

Respondent,

F.D.M.B., Inc.,

Appellant.

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(40) Laurel A. Wedinger & John S. Zachary, Staten Island, for appellants.
Robert Abrams, Attorney General, Ezra I. Bialik & O. Peter Sherwood of counsel) for respondent.
(41) John Marangos, Staten Island, for appellant.
Robert Abrams, Attorney General (Helene G. Goldberger of counsel) for respondent.
(42 & 43) John J. Turvey & Abe Reiss, Staten Island, for appellants.
Robert Abrams, Attorney General (Ezra I. Bialik, O. Peter Sherwood, William J. Caplan & Harvey M. Berman of counsel) for respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

BELLACOSA, J.:

These cases pit the property interests of several individuals and corporations against the New York State Department of Environmental Conservation's efforts, under legislative mandate, to preserve freshwater wetlands on Staten Island. The battles have raged in the courts and in the legislative corridors for years and have culminated

in these four proceedings with appeals in this Court and in recent remedial legislation (L 1987, ch 408).

The common and decisive issue, among several raised by appellants, is whether DEC's failure to designate their Bloeser's Pond properties on a tentative map prepared in 1981 exempts the properties from DEC jurisdiction and regulation. Subsequent tentative and final mappings in 1986 and 1987 included the properties. We agree with the Appellate Division and affirm that court's orders. DEC has continuing jurisdiction under the "Freshwater Wetlands Act" to identify and to map potential freshwater wetlands at least up to and including the promulgation of a final map.

The "Freshwater Wetlands Act" (ECL art 24) was enacted in 1975 "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands." To accomplish this desirable goal, the Act assigns the Commissioner of DEC the formidable task, "as soon as practicable," to study and to map parcels of wetlands throughout the State having an area of at least 12.4 acres or areas measuring less than 12.4 acres deemed of "unusual local importance" (ECL §24-0301[1]). DEC is responsible for regulating the use of designated wetlands, and §24-0701 of the Act prohibits landowners from engaging in certain activities on the designated properties unless a permit is obtained from DEC.

As stages of its review progress and are completed in a particular area, the DEC is directed to prepare tentative

maps, detailing the boundaries of the areas determined up to that point in time to be freshwater wetlands (ECL §24-0301[2]). Pending completion of the mapping process, interim permits are available for parcels tentatively designated as wetland (ECL §24-0703[5]; 6 NYCRR Part 662). Any landowner who is unaware of a particular parcel's status may make a written inquiry to DEC, and the agency is required to respond, in writing, within 30 days (ECL §24-0703[5]).

Prior to promulgation of a final map, DEC is required to give the community and affected landowners specific notice and opportunity to be heard (ECL §24-0301[4]). Once promulgated, a final map may even be amended by the Commissioner to correct any deficiencies and to effect any additions, deletions or technical changes on the map. Prior to amending a final map, however, the Commissioner must first provide to each owner of record further notice and opportunity to be heard (ECL §24-0301[6]; *see also*, 6 NYCRR Part 664).

In 1981, DEC prepared a tentative map for Richmond County designating approximately 700 acres as freshwater wetlands. Although the statute does not require DEC to do so, the tenative map was filed with the Richmond County Clerk's office. Shortly afterwards, a public hearing was held (ECL §24-0301[4]). Based upon public comment and upon continued investigation of the area, DEC determined that it had not designated, on that first map, several hundred additional acres which qualified under the statute. As a result, in 1986, DEC issued a second tentative map which almost doubled, to 1,300 acres, he designated freshwater wetland properties on Staten Island. In July 1986, another public hearing was held relating to the revis-

ed tentative map. In September 1987 a final map was promulgated.

The properties of petitioners in these four cases were not designated on the 1981 tentative map, but they were on the 1986 tentative map and the 1987 final map. Indeed, the petitioners in these four proceedings purchased interests in parcels of land located in the Bloeser's Pond area of Richmond County only in 1984, when none of the subject parcels were as yet on any wetlands map.

In 1985, DEC began its study of the Bloeser's Pond area as a possible freshwater wetland. Initially, DEC was considering designating the site as an area of "unusual local importance," the alternative predicate under the statute. It was later discovered, however, that the site contained 14.6 acres of wetlands and could therefore qualify on aggregate acreage as a wetland, without invoking the "unusual local importance" standard.

While conducting its investigation for designation purposes, DEC discovered that the petitioners were beginning to develop their newly purchased lands in an apparent effort to anticipate and avoid any subsequent wetlands designation. DEC formally notified the petitioners by letter that their lands were tentatively identified as freshwater wetlands, and that if they wanted to continue development they had to apply first for a permit from DEC pursuant to ECL §24-0703[5] (*see also,* 6 NYCRR Part 662). The properties were still not on any wetlands map.

Rather than seeking the interim permits from DEC, petitioners commenced article 78 proceedings challenging DEC's attempt to regulate their properties. The petitioners alleged that they had expended substantial money in preparing to build on their properties and that DEC had

failed to give them any prior notice that their parcels constituted wetlands. They also claimed that DEC's "interim designations" of the property as wetlands were arbitrary and capricious and constituted a deprivation of property without just compensation and without notice.

Supreme Court, Richmond County, granted the petitions solely on the ground asserted, sua sponte, by the trial court that DEC lacked "jurisdiction" over the subject properties. The Appellate Division unanimously reversed all four cases and dismissed the petitions. It correctly upheld the DEC's jurisdiction and actions in every respect (*see, Matter of Wedinger v. Goldberger,* 129 AD2d 712).

We turn first to jurisdiction. The trial court erred in concluding that DEC had no jurisdiction over the subject properties. It alluded to the definition in ECL §24-0107(1) defining a freshwater wetland, in part, as "lands and water of the State as shown on the freshwater wetlands map." Then it reasoned that since petitioner's properties did not appear on the 1981 tentative map, the properties fell outside the statutory definition of a wetland and outside of DEC regulation under the Act.

The definition may not be interpreted so slenderly, for we would then be ignoring other relevant and integrated portions of the statutory scheme and the plain purpose of the "Freshwater Wetlands Act." For example, ECL §24-0703(5) provides:

> *Prior to the promulgation of the final freshwater map* in a particular area and the implementation of a freshwater wetlands protection law or ordinance, no person shall conduct or cause to be conducted any activity for which a permit is required under §24-0701 of this article on any freshwater wetland unless he has obtained a permit from

the commission under this section. *Any person may inquire of the department as to whether or not a given parcel of land will be designated a freshwater wetland subject to regulation.* The department shall give a definitive answer within thirty days of such request as to whether such parcel will or will not be so designated . . ." [emphasis added].

This provision would be rendered meaningless if DEC lacked jurisdiction to regulate wetlands during the entire evolving period up to and including final mapping. The effective date of the legislation (L 1975, c 614, effective 9-1-75) and the promulgation of a final map is the critical span of jurisdictional life we must examine for purposes of deciding these cases. The mere fact that a particular property was not placed on a tentative map is not decisive and certainly does not deprive the DEC of legislatively delegated jurisdiction. The length of time it has taken DEC to fulfill its mandate, however unfortunate, does not determine or diminish the jurisdiction delegated to it by the Legislature.

Sound statutory construction, relevant authorities, and the expert interpretation of the agency itself support the conclusion we reach, along with the Appellate Division, that DEC has jurisdiction of the subject properties in these cases under the Act. We adopt the fine summary expressed by former Justice Sweeney: "The plain language of this subdivision [ECL §24-0703(5)] proscribes activity on said lands prior to promulgation of a final wetland map unless a permit has been issued. This clear language together with the express public policy and intent of the legislation as declared in ECL §24-0103, *confers jurisdiction in DEC for the entire period between the effective date of the Act and promulgation of a final map. To hold otherwise would frustrate the clear intent and purpose of the legislation" (Matter of Tri-Cities Industrial Park v. Commissioner of DEC,* 76 AD2d 232, 235-236 [emphasis

supplied], *app den* 51 NY2d 706 [1980]; *see also, Matter of Drexler v. Town of New Castle,* 62 NY2d 413 [1984]; *see,* Weinberg, Practice Commentary, McKinneys Cons Laws of NY, Book 17½, ECL Art 24, at 469-470 and 1988 Cumulative Annual Pocketpart, at 60).

Petitioners, further, have contended that the mere tentative designation as a "wetland" amounts to a deprivation of property without just compensation and without prior notice, relying principally on *Fred F. French Investing Co. v. City of New York* (39 NY2d 587, *app dism* 429 US 990 [1976]). The reliance is misplaced and the argument fails. In *French,* the zoning ordinance converted private lands into public domain and a deprivation was effected by operation of the ordinance itself. In sharp contrast, under ECL article 24, tentative designation as a wetland does not prohibit development nor does it convert the ownership from private to public in any property sense; it merely requires that those holding property interests and wishing to engage in certain activities obtain an administrative permit. The Act itself does not constitute a deprivation because the landowner may continue development pursuant to a permit. Indeed, by resorting to the courts instead of exhausting available administrative remedies, petitioners have acted prematurely and are not entitled to any relief on this "taking" issue (*see, Matter of Parkview Associates v. City of New York,* __ NY2d __ [slip opn, decided 2-9-88]; *Church of St. Paul & St. Andrew v. Barwick,* 67 NY2d 570).

In *Matter of Spears v. Berle* (48 NY2d 254 [1979]), we held that in order to sustain a claim of a taking, a landowner "has a heavy burden of proof" (*id.,* at 263). A "taking" can be established only if a permit has been sought and denied and the owner has demonstrated "that under no permissible use would the parcel as a whole be

capable of producing a reasonable return or be adaptable to other suitable private use" (*id.*, at 263). In the instant cases, petitioners, by not seeking a permit prior to commencing this action, have failed to take even the threshold step in this orderly two-step process.

Petitioners insist, however, that their failure to seek a permit is not fatal to their taking argument. They direct us to *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (__US__, 107 S Ct 2378 [1987]) for the proposition that a temporary regulatory taking nevertheless requires compensation for the period of time prior to the final mapping. In *First Evangelical,* the Supreme Court stated:

> We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective (107 S Ct 2378, 2389, *supra*).

Significantly, the case does not change the requirement for a landowner first to establish that a taking has occurred. Here, the petitioners have not and cannot make that indispensible showing without at least first seeking a permit under the Act, so *First Evangelical* is inapposite.

Relevantly, petitioners were also afforded notice and opportunity to be heard at the time of the 1986 tentative mapping and again prior to final mapping. DEC's notification to all affected landowners and to the community produced a July 1986 public hearing. The trial court's view that each landowner was entitled to an individual hearing upon tentative designation of its wetlands finds no support in the statute or in the fair and practical implementation of this statutory scheme. It erroneously

relied in this respect on 6 NYCRR Part 664.7(a)(2)(i) which requires individual hearings only prior to *amendment* of a *final map,* a situation not present or pertinent here.

Petitioners in two of the four present cases, *Marine Equities* and *Chesed Avrhom,* urge additionally that 6 NYCRR Part 664.7(a)(2)(i) allows them to continue construction activity initiated on their properties prior to tentative designation as wetlands on a map. They are mistaken. The cited regulation applies only to landowners whose properties do not appear on a final map; here, the properties were not only on the final map, but also on the 1986 tentative map.

Petitioners' arguments that they relied on DEC's 1981 tentative map when they acquired, in 1984, their property interests and that DEC should be equitably estopped from enforcing the 1986 mapping designation are refuted by undeviating precedents of this Court (*see, most recently, Matter of Parkview Associates v. City of New York,* __ NY2d __ [slip opn, decided 2-9-88], *supra; Matter of EFS Ventures Corp. v. Foster,* __ NY2d __ [slip opn, decided 2-9-88]; *Scruggs-Leftwich v. Rivercross Tenants' Corp.,* 70 NY2d 30, 33).

We also note that these controversies include petitioners' assertions that the statute does not authorize a second tentative mapping. While no one anticipated or desired that the identification and mapping process would span a dozen years, and while the statute does not expressly authorize a second tentative mapping, nothing prohibits this step (*see,* concerns expressed in Memoranda [1] of the Association of Towns [7-24-75] to Governor Carey and [2] of the Secretary of State [7-25-75] to Counsel to the Governor, both in Governor's Bill Jacket to L 1975, ch

614). This statute, when interpreted reasonably, contemplates a mapping process, however long; it does not create an artificial, intermittently circumscribed jurisdictional anomaly.

Moreover, petitioners and other landowners are not left without remedies. While we cannot pass on the 1987 amendatory legislation, we note that shortly after the Appellate Division rendered its decisions in these cases, additional administrative review and appeal procedures were created especially for Richmond County landowners who may have suffered "undue hardship" as a result of the second tentative mapping (L 1987, ch 408). That legislation reflects, at the very least, a 1987 statutory recognition of the second tentative mapping step under the 1975 authorization for a mapping process (*see,* ECL §§24-1104, 24-1105[2], 24-1301[4]).

DEC has acted lawfully and within its jurisdictional powers in these cases.

Accordingly, the order of the Appellate Division in each case should be affirmed, with costs.

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In each case: Order affirmed, with costs. Opinion by Judge Bellacosa. Chief Judge Wachtler and Judges Simons, Kaye, Alexander and Hancock concur. Judge Titone took no part.

Decided March 22, 1988